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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 BEVERLY M. M.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.
16

CASE NO. 2:22-cv-00080-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local
18 Magistrate Judge Rule MJR 13. *See also* Consent to Proceed Before a United States Magistrate
19 Judge, Dkt. 3. This matter has been fully briefed. *See* Dkts. 15, 16, 17.

20 Plaintiff is a 56-year-old woman whose most recent employment was in 2002 when she
21 worked as a cook at various restaurants. Plaintiff states that she is unable to maintain
22 employment because of her spinal impairment, chronic back and neck pain, and shoulder pain.
23 Plaintiff states that due to her physical impairments, she is not able to walk longer than two
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1 blocks, is only able to lift minimal amounts of weight, and often has to alternate between sitting
2 and standing. The Administrative Law Judge (“ALJ”) found that plaintiff was not disabled
3 because she has the residual functional capacity (“RFC”) to perform sedentary work.

4 In finding plaintiff not disabled, the ALJ rejected part of Dr. Crist’s opinion. But because
5 the ALJ did not explain why he did so, the ALJ erred. The ALJ’s error is not harmless because
6 the RFC determination could have well differed had the improperly rejected evidence been
7 credited. Therefore, this matter is remanded for further proceedings.

8 **PROCEDURAL HISTORY**

9 This is the third time plaintiff is seeking review of her applications with this Court.
10 Plaintiff filed applications for disability insurance benefits (“DIB”) pursuant to 42 U.S.C. § 423
11 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42 U.S.C. § 1382(a)
12 (Title XVI) of the Social Security Act in April 2007, alleging a disability onset date of December
13 1, 2002. *See* Administrative Record (“AR”) 121–29, 2018. Both applications were denied
14 initially and following reconsideration. AR 72–83, 2018.

15 Plaintiff’s first requested hearing was held before Administrative Law Judge Gary J.
16 Shuttles (“the ALJ”) on October 7, 2009. *See* AR 33–67. On November 4, 2009, ALJ Shuttles
17 issued a written decision concluding that plaintiff was not disabled pursuant to the Social
18 Security Act. *See* AR 13–32. On December 5, 2011, pursuant to the parties’ stipulation, this
19 Court remanded plaintiff’s case for a new hearing. AR 707–11.

20 ALJ Scott R. Morris held a second hearing and issued a decision on June 27, 2013,
21 finding plaintiff not disabled. AR 472–531, 717–52. On November 22, 2014, the Appeals
22 Council remanded for a new hearing and a new decision. AR 753–58.

1 ALJ Tom L. Morris held a third hearing and issued a third decision on September 28,
2 2016, finding plaintiff not disabled. AR 532–600, 759–90. On September 22, 2017, the Appeals
3 Council again remanded for a new hearing and a new decision. AR 791–97.

4 ALJ Raymond Souza held two hearings and issued a fourth decision on June 5, 2019,
5 finding plaintiff was not disabled prior to June 15, 2015. AR 432–71, 601–52, 2269–2305. On
6 August 7, 2020, this Court affirmed the ALJ’s finding that plaintiff was disabled as of June 15,
7 2015, but remanded the case with instructions to reevaluate evidence, reassess plaintiff’s residual
8 functional capacity (“RFC”), and re-do to the five-step disability process with respect to the
9 period before June 15, 2015. *See* AR 2112–24.

10 ALJ C. Howard Prinsloo held a hearing on September 2, 2021 and issued a fifth decision
11 on September 28, 2021, finding plaintiff had the RFC to perform sedentary work with exertional,
12 postural, and environmental limitations prior to June 15, 2015. AR 2015–53, 2054–66. The ALJ
13 thus concluded that plaintiff was not disabled from December 1, 2002 through June 14, 2015.
14 AR 2040.

15 Plaintiff filed a complaint in this Court seeking judicial review of the ALJ’s September
16 2021 decision on January 28, 2022. *See* Dkt. 6. Defendant filed the sealed administrative record
17 regarding this matter (“AR.”) on June 3, 2022. *See* Dkt. 10.

18 BACKGROUND

19 Plaintiff, 56, was born in 1966 and was 36 years old on the alleged date of disability
20 onset of December 1, 2002. *See* AR 2039. Plaintiff has at least a high school education and
21 worked in various restaurants until she quit. *See id*; AR 38–40. According to the ALJ, plaintiff
22 had at least the severe impairments of spinal impairment(s), right shoulder impairment(s), pain
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disorder(s), depressive disorder(s), anxiety disorder(s) (including post-traumatic stress disorder), personality disorder(s), and substance use disorder prior to June 15, 2015. AR 2022.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) whether the ALJ properly evaluated medical opinion evidence; (2) whether the ALJ properly evaluated plaintiff's symptom testimony; (3) whether the ALJ properly evaluated lay evidence; and (4) whether the ALJ properly assessed plaintiff's residual functional capacity ("RFC"). *See* Dkt. 15, p. 1. Because the first issue is dispositive and the Court is remanding the matter for further proceedings, the Court declines to reach the remaining issues.

I. Whether the ALJ Properly Evaluated Medical Opinions

Plaintiff contends the ALJ erred in evaluating the medical opinion of Dr. Robert Crist. Dkt. 15, pp. 7–9.

Plaintiff filed her applications prior to March 27, 2017. AR 121–29, 2018. Pursuant to the applicable rules at the time, in assessing an acceptable medical source, an ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). When a treating or examining doctor's opinion is contradicted, the opinion can be rejected "for specific

1 and legitimate reasons that are supported by substantial evidence in the record.” *Lester*, 81 F.3d
2 at 830–31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*,
3 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by “setting out a detailed and
4 thorough summary of the facts and conflicting clinical evidence, stating his interpretation
5 thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing
6 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

7 In April 2005, Dr. Crist opined that plaintiff is able to perform sedentary work,
8 specifically walk or stand for two to three hours and occasionally lift 10 to 20 pounds. *See* AR
9 365. He also opined that plaintiff is able sit for four to five hours, but “would probably have to
10 alter position and change position during that period.” *See id.* The ALJ gave “significant” weight
11 to Dr. Crist’s opinion regarding plaintiff’s walking, standing, and lifting limitations. *See* AR
12 2035. Plaintiff argues the ALJ erred by crediting Dr. Crist’s opinion but failing to incorporate all
13 of his limitations, namely, plaintiff’s need to change position while sitting. Dkt. 15, p. 8. The
14 Court agrees.

15 Though the limitations the ALJ incorporates into the RFC does not need to be identical to
16 the limitations assessed by a physician, the RFC must nonetheless be consistent with the
17 physician’s opinion. *See Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1222–23 (9th Cir. 2010).
18 But in this case, the RFC does not sufficiently reflect Dr. Crist’s opinion regarding plaintiff’s
19 need to change positions. The ALJ assessed plaintiff has the RFC to perform:

20 sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except: no more
21 than occasional pushing and/or pulling with the right upper extremity; occasional
22 stooping, kneeling, crouching, crawling, and climbing ramps and stairs; no
23 climbing ladders, ropes, or scaffolds or exposure to vibration or hazards; frequent
24 handling or fingering with the right upper extremity; occasional reaching
overhead with the right upper extremity; able to perform simple routine tasks.

1 AR 2025. While the RFC provides that plaintiff is able to perform sedentary work and simple
2 routine tasks with exertional, postural, and environmental limitations, it does not indicate
3 plaintiff's need to change position. Notably, during the September 2021 hearing, while posing
4 hypotheticals to the vocational expert about the jobs plaintiff may be able to do based on her
5 RFC, the ALJ did not include any questions about needing to change positions. *See* AR 2060–66.

6 Further, the ALJ did not provide an explanation as to why Dr. Crist's opinion regarding
7 plaintiff's need to change positions was ultimately rejected. While the ALJ explained why Dr.
8 Crist's opinion regarding plaintiff's ability to lift up to 10 pounds occasionally and stand and
9 walk for two hours were incorporated into plaintiff's RFC, the ALJ was silent as to the rest of
10 Dr. Crist's opinion. *See* AR 2035. *See Valentine v. Comm'r of Social Sec. Admin.*,
11 574 F.3d 685, 690 (9th Cir. 2009) (holding that an RFC assessment must include all of the
12 claimant's functional limitations supported by the record); Social Security Ruling 96-8p, ("If the
13 RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain
14 why the opinion was not adopted.").

15 The Commissioner argues the ALJ's evaluation is reasonable, considering that the ALJ
16 assessed an RFC more restrictive than Dr. Crist's opinion. Dkt. 16, p. 16. However, the RFC is
17 only more restrictive in terms of plaintiff's ability to lift, not whether plaintiff is able to change
18 positions, which is the limitation at issue. AR 365, 2025. The Commissioner also argues that
19 elsewhere in the ALJ's decision, the ALJ provides other valid reasons in discounting plaintiff's
20 limitation in sitting, namely that it is consistent with plaintiff's physical examinations. Dkt. 16, p.
21 16. But the Court may only affirm an ALJ's decision based on the reasons actually given, "not
22 *post hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking."
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1 *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225–26 (9th Cir. 2009) (citing *SEC v.*
2 *Chenery Corp.*, 332 U.S. 194, 196 (1947)).

3 To properly credit Dr. Crist’s opinion, the ALJ needed to ensure plaintiff’s RFC was
4 consistent with all of Dr. Crist’s opined limitations, or provide a valid reason as to why Dr.
5 Crist’s opinion regarding plaintiff’s need to change position was rejected. As the ALJ did neither
6 here, the Court finds that the ALJ erred in evaluating Dr. Crist’s opinion.

7 An error is harmless if it is not prejudicial to the claimant or is “inconsequential” to the
8 ALJ’s “ultimate nondisability determination.” *Stout v. Commissioner, Social Security Admin.*,
9 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012).
10 The determination as to whether an error is harmless requires a “case-specific application of
11 judgment” by the reviewing court, based on an examination of the record made “‘without regard
12 to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at 1118–1119
13 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (quoting 28 U.S.C. §2111)).

14 The ALJ’s error in this case was not harmless. Had the ALJ properly evaluated Dr.
15 Crist’s opinion regarding plaintiff’s need to change positions, the ALJ may have assessed
16 plaintiff’s RFC differently and affected the ALJ’s ultimate determination of nondisability.
17 Accordingly, the ALJ’s harmful error requires reversal. The Court directs the ALJ to reassess Dr.
18 Crist’s opinion on remand.

19 **II. Other Issues**

20 Plaintiff contends the ALJ also erred in evaluating the medical opinions of Dr. Coren, Dr.
21 Blair, Dr. Duckworth and Mr. Myers, Dr. Douglas Lindahl, Dr. Keith Kreuger, and Dr. Darius
22 Ghazi, her testimony, and lay witness testimony. Dkt. 15, pp. 4–7, 9–17. Because this Court is
23 remanding this matter for further proceedings, the ALJ must reassess all of the evidence and
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1 make another RFC determination. *See* Program Operations Manual System (POMS) GN
 2 03106.036 *Court Remand Orders*, <https://secure.ssa.gov/poms.nsf/lnx/0203106036> (last visited
 3 April 14, 2022) (a court order vacating a prior decision and remanding the case voids the prior
 4 decision and thus returns the case to the status of a pending claim). Thus, this Court does not
 5 address plaintiff's remaining issues.

6 **III. Remand for Further Proceedings**

7 Plaintiff argues this case should be remanded for an award of benefits because if Dr.
 8 Crist's opinion is credited as true, the evidence would show plaintiff was disabled during the
 9 relevant period. Dkt. 15, p. 19. In the alternative, plaintiff suggests that the Court remand for
 10 further proceedings, including a new hearing and new decision limited to the relevant period. *Id.*

11 "The decision whether to remand a case for additional evidence, or simply to award
 12 benefits[,] is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.
 13 1987). If an ALJ makes an error and the record is uncertain and ambiguous, the court should
 14 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir.
 15 2017). Likewise, if the court concludes that additional proceedings can remedy the ALJ's errors,
 16 it should remand the case for further consideration. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th
 17 Cir. 2017).

18 The Ninth Circuit has developed a three-step analysis for determining when to remand
 19 for a direct award of benefits. Such remand is generally proper only where:

20 (1) the record has been fully developed and further administrative proceedings
 21 would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient
 22 reasons for rejecting evidence, whether claimant testimony or medical opinion;
 23 and (3) if the improperly discredited evidence were credited as true, the ALJ
 24 would be required to find the claimant disabled on remand.

1 *Trevizo v. Berryhill*, 871 F.3d 664, 682–83 (9th Cir. 2017) (quoting *Garrison v. Colvin*, 759 F.3d
2 995, 1017 (9th Cir. 2014)). However, when an ALJ errs, the proper course is to remand for
3 further administrative proceedings “except in rare circumstances.” *Treichler v. Comm’r of Soc.*
4 *Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014).

5 In this case, if Dr. Crist’s opinion is credited as true, the ALJ would not be required to
6 find plaintiff disabled on remand. Thus, remanding for an award of benefits would not be proper
7 at this time. Instead, remanding for further proceedings would be the more appropriate remedy,
8 as “the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled
9 within the meaning of the Social Security Act.”” *See Burrell v. Colvin*, 775 F.3d 1133, 1141 (9th
10 Cir. 2014) (quoting *Garrison*, 759 F.3d at 1021). Specifically, the record requires further
11 development to determine the extent of any additional limitations to plaintiff’s RFC. While the
12 Court acknowledges that plaintiff has undergone several hearings since she first applied for
13 benefits, the issue of whether the ALJ properly evaluated medical opinion evidence, plaintiff’s
14 testimony, lay witness testimony, and properly determined plaintiff’s RFC determination still
15 create “serious doubt as to whether the claimant [was], in fact, disabled” during the relevant
16 period. *Burrell*, 775 F.3d at 1141. Thus, the Court exercises its discretion to remand this case for
17 further proceedings.

18 CONCLUSION

19 Based on these reasons and the relevant record, the Court **ORDERS** that this matter be
20 **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the
21 Commissioner for further consideration consistent with this order.

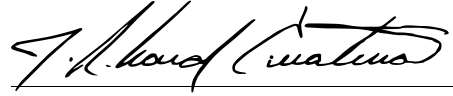
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1 **JUDGMENT** should be for plaintiff and the case should be closed.

2 Dated this 5th day of October, 2022.

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6 J. Richard Creatura
7 Chief United States Magistrate Judge
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